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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street N.W.
Washington, DC 20554

RE: ET Docket No. 92-9, FCC 92-437; Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies.

Dear Secretary Searcy:

Introduction

The American Gas Association (A.G.A.) is a national trade association comprising approximately 250 natural gas distribution and transmission companies located throughout the United States. Collectively, 90 percent of the gas consumers in this country are served by A.G.A. members. Because the proposed rule on new personal communication services could have a significant impact on the ability of our members to adequately and safely operate their existing distribution and transmission systems, we have a direct interest in the proposed actions.

Overview

A.G.A. submits these written comments in response to the Federal Communications Commission's (FCC) First Report and Order ("R&O") and Third Notice of Proposed Rule Making (Third NPRM), FCC 92-437, released October 16, 1992, in the above-captioned proceeding. The FCC's R&O disclosed that the Commission intends to go forward with its plan to make spectrum available in the 2 GHz band for "future communications services that employ emerging technologies."[1]

The R&O sets out a number of specific requirements that govern how the interests of prospective and current users of the spectrum will be accommodated. For the most part, the FCC's R&O would allocate spectrum in the following manner: 1) a transition period in which current users and new technologies would use the spectrum on a co-primary basis; 2) emerging technologies desiring to use an existing users frequencies could enter into voluntary negotiations to purchase the frequencies; 3) after the transitional period has ended, existing users would remain co-primary, but could be forced out of the band; 4) emerging technologies wishing to force an existing user out of the band would have to

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[1] Report and Order, at ¶ 1.

guarantee payment for relocation and demonstrate that the new service contains the same reliability as on the former frequency.[2]

In order to more fully develop the rule, the FCC issued, in the same document, a Third NPRM requesting that comments be submitted in response to the following questions: 1) the appropriate duration of the transition period; 2) should a new licensee be required to wait 1 year after licensing before he or she could force an existing user out of the spectrum; and 3) if voluntary negotiations do not work, what sort of dispute resolution should be utilized.[3] A.G.A.'s comments in this matter will address the questions that have been listed above.

Although A.G.A. has continued to oppose the FCC's plan with regard to the allocation of the 2 GHz spectrum, we are pleased that the FCC has been receptive to our concerns and appears to have a genuine desire to protect the interest of existing users. Of course, the contents of the final rule, and manner in which it is carried out, will determine how much protection is afforded existing users. A.G.A. strongly believes that the utility industries, particularly the gas industry, have demonstrated that their use of the spectrum is within the public interest, and, therefore, should be afforded a high level of protection.

Several factors require that the spectrum allocation rule give a strong preference to the interests of the affected utilities. First, as stated above, the utilities have demonstrated that their current use of the spectrum is in the public interest. Second, the record in this matter has not established the viability of any particular "emerging technology", nor has there been a showing that the implementation of these technologies is in the public interest.

Duration of the Transition Period

The transition period should be as long as possible, with a minimum of 10 years before involuntary negotiations would be required. A long transition time will benefit all those interested. The additional time will enable the FCC to gather more information on the feasibility of various technologies, work out the rechannelizing issues that have been raised in related dockets, and develop a record on the extent of the public need for "emerging technologies."

The longer transition period also ensures that only serious providers of "emerging technologies" enter the market. Only those companies that have fully researched the market and have products ready to commercialize will be willing to enter into negotiations

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[2]Id. at ¶ 24.

[3]Third NPRM at ¶¶ 25-27.

with existing users. This will discourage speculators from obtaining spectrum that will not be fully utilized. More importantly, the longer transition period is likely to foster genuine negotiations on the part of new users. Providers of new services, if they want the spectrum in the earlier years of the transition period, will have to bargain in good faith, offering what the market truly will pay for the use of the spectrum. With a shorter period, new users may avoid the voluntary aspect of the rule altogether and seek mandatory negotiations, which may not always bear what the market would pay for relocation and use of the spectrum.

The longer period also will give those companies that have recently purchased new equipment or systems more time to recoup their investment. On the other hand, those companies that need to upgrade their systems, may wish to forgo the added expense of upgrading, and, instead, enter into negotiations with new users. With more time to voluntarily consider their options, it is likely that companies that can more easily relocate will do so. A shorter transition period is not likely to result in the same level of optimum relocation, because the ability to freely consider ones options will have terminated when the voluntary transition period is over.

One Year Trial Period

A.G.A. supports the proposal that would require an emerging technology provider to wait one year before forcing an existing user out of the spectrum. The one-year period, which would occur after negotiations or arbitration, would provide the existing user time to determine if its new system is adequate. The one-year requirement will ensure that new users do not expend large sums of money, only to have to vacate the frequency when the former user has demonstrated that the system provided for it is not adequate. This additional waiting time also will further discourage speculators that are looking for a quick opportunity to turn a recent acquisition into a quick profit.

Framework for Dispute Resolution

Before discussing the type of dispute resolution mechanism that should be used to determine the merits of the parties arguments, I would like to briefly cover some of what is required of the emerging technology provider. The FCC's R&O indicates that providers of emerging technologies that wish to remove an existing users from the spectrum will have to: 1) pay the relocation costs; 2) provide a communication system that is of equal or better reliability than the existing system; and 3) if the system proves unsatisfactory, the new user must relocate the displaced user back to its original facilities.

A.G.A. is pleased that the proposals attempt to strike a balance between the perceived need for new technologies and the publics interest in safe and reliable communications for the utility industries, such as the natural gas industry. Additionally, we urge that the

final rule provide existing users with an opportunity to oppose a relocation by demonstrating that the new users system would not serve the publics' interest to the extent of the former system. In fact, once the current user demonstrates that their use is in the public interest, the onus should be on the new user to demonstrate that his proposed use of the spectrum will better serve the publics' interest; because, only the new user can adequately project the extent of its systems potential benefits.

Another part of the FCC proposal would provide either guaranteed payment for the costs associated with relocation or that the new users actually build a new communication system for the dislocated user. A.G.A. urges that, in the case of payment, the FCC require money be placed in an escrow account or that a secured bond be purchased. If a new system is to be built, the displaced user should be the one to define what is a "comparable" system. Displaced users should be empowered to reject a system as inappropriate, if the long term costs of operating such a system unreasonably exceed the costs of the users former system. Furthermore, the displaced user should be able to exercise reasonable oversight of such a project.

Lastly, should negotiations between current and future users of the spectrum breakdown, we urge that the FCC's final rule give the displaced user the option of choosing the appropriate alternative dispute resolution forum. We also would urge that the final rule place the expense of such a proceeding on the emerging technology provider, unless it can be shown that the existing user acted in bad faith regarding voluntary negotiations. Requiring the emerging technology provider to pay the costs of dispute resolution will likely result in more genuinely productive negotiations than might otherwise occur, which could lead to less delay and expense.

Use of Tax Certificates to Defer Capital Gains

A.G.A. supports the FCC proposal that tax certificates be provided to microwave users that are relocated to higher bands. It would appear, however, that the FCC will have to work with the Internal Revenue Service (IRS) to get approval for such a plan. We would be willing to contribute to any effort to gain the IRS's support of such a program. It only seems reasonable that an existing user that is forced to relocate, or relocates out of concern that it may be forced to move in the future, should have its new system treated as a trade in kind. Two factors would appear to support this contention - - the involuntary nature of relocation, and the fact that no real benefit has accrued to the receiver of a new communication system, when it is a replacement for an old system.

Conclusion

A.G.A. has followed with great interest the FCC's plan to provide spectrum for emerging technologies, such as personal communication systems. It has not been our intention to impede the development of new technologies. We, however, have an obligation to our member companies, and the public that they serve, to see that the FCC implement a rule that does not disrupt the level of service provided by the natural gas industry. Many of our initial concerns have been addressed in the FCC's R&O. A.G.A. believes it important that spectrum be made available only for those companies capable of adequately compensating the existing fixed microwave users. We commend the FCC for the changes that appear in its latest proposal and urge that these provisions be implemented in such a manner that will maintain the level of communications reliability currently enjoyed by the natural gas industry.

Respectfully submitted,

THE AMERICAN GAS ASSOCIATION

January 13, 1993 By: Michael Baly III

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